Circuit Court for Baltimore City
Case No.: 118290012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 53

September Term, 2019

AMARI MALIK CLINKSCALES

v.

STATE OF MARYLAND

Friedman,
Beachley,
Gould,

JJ.

Opinion by Beachley, J.

Filed: July 1, 2020

Appellant Amari Clinkscales was convicted by a jury in the Circuit Court for Baltimore City of possession of a regulated firearm after having been convicted of a disqualifying crime and wearing and carrying a handgun. The court sentenced appellant to eight years for the possession of a regulated firearm conviction, the first five without the possibility of parole, and a concurrent sentence of three years for wearing and carrying a handgun. Appellant timely appealed and presents the following issues for our review:

1. Did the trial court err in permitting the State to elicit improper lay opinion testimony from its primary law enforcement witnesses?

2. Did the trial court err in allowing the State to introduce an unidentified out-of-court declarant's accusation that [a]ppellant was trespassing prior to the officers' observations of him?

3. Did the trial court err in providing a supplemental instruction concerning the inferences the jury should draw from the fact that the State altered body camera footage from the officers?

For the following reasons, we shall affirm.

FACTUAL BACKGROUND

On September 28, 2018, at approximately 9:00 p.m., Detective Michael Wood, Sergeant Gregory Shuttleworth, and Officer Amos Shank were on patrol in the 700 block of North Woodington Road in Baltimore City when they came upon a vacant house located at the corner of Cranston Avenue and Woodington Road. Detective Wood testified that the corner was known to be "particularly violent" because of a number of shootings in the area, as well as the fact that an open-air drug market was located nearby.

As they approached, Detective Wood saw two individuals, one of whom would later be identified as appellant, sitting on the front porch. A third unidentified individual told

appellant and the other person that they were trespassing. Detective Wood observed appellant stand up with his right hand pressed tightly against the side of his body, and begin walking away from the direction of the patrol vehicle.

Appellant continued walking with his right arm clenched tightly against the right side of his body. The officers followed appellant, and they eventually exited their vehicle and attempted to frisk him for weapons. As Detective Wood moved his hands toward appellant's person to conduct the frisk, appellant pushed Detective Wood's hands away and ran. Detective Wood and Sergeant Shuttleworth gave chase, and as they followed appellant down an alley, appellant reached for the right side of his body and threw a firearm onto the ground. Detective Wood then tackled appellant, and Officer Shank recovered the firearm from the ground—an operable and fully loaded Colt .357 Magnum.

The State charged appellant, by way of indictment, with several firearm-related offenses, and following a jury trial, the jury convicted appellant of possession of a regulated firearm after having been convicted of a disqualifying crime, and wearing, carrying, or transporting a handgun. We shall provide additional facts as necessary.

DISCUSSION

I. Lay Opinion Testimony

Appellant first argues that the trial court erred in allowing both Detective Wood and Sergeant Shuttleworth to testify that, in their opinion, appellant "exhibited characteristics consistent with the profile of an armed individual." Noting that the State never offered either officer as an expert witness, appellant claims that this testimony was inadmissible

lay opinion. As we shall explain, assuming *arguendo* the trial court erred in admitting this testimony, any error was harmless beyond a reasonable doubt.

In his brief, appellant points to two separate instances where he claims the trial court improperly allowed lay opinion testimony. The first colloquy occurred during Detective Wood's direct examination:

[DETECTIVE WOOD]:	These two individuals, one identified as the defendant stood up. The defendant stood up with his right hand clenched very tightly against his right side of his body in a manner in which I'm doing now. That individual got up. He walked away from our patrol vehicle which has now turned onto Cranston, across the street on the west side of Woodington.
[THE STATE]:	Okay.
[DETECTIVE WOOD]:	Based on my observations those -- you know, that's not a -- it wasn't a normal -- when I see people stand up, you know, you -- typically they stand up with both hands at their side.
[DEFENSE COUNSEL]:	Objection.
THE COURT:	Sustained.
[DETECTIVE WOOD]:	The way he stood up to me was --
[DEFENSE COUNSEL]:	Objection.
THE COURT:	Overruled.
[DETECTIVE WOOD]:	-- the way he stood up to me was very, you know, particular. Based on my training, knowledge and experience, that

-- that hand clenched like that, I thought he might be concealing a firearm.

The second colloquy occurred during Sergeant Shuttleworth's direct examination:

[THE STATE]: Okay. And as far as what the person that Detective Wood alerted you to, what, if anything did you observe as to that person?

[SERGEANT SHUTTLEWORTH]: When we turned onto Gelston Street I observed the defendant with a very stiff arm at a 45 degree angle holding a weapon on the right side of his body.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

* * *

[THE STATE]: Okay. And how did you know that it was a weapon?

[SERGEANT SHUTTLEWORTH]: Due to his mannerisms, him being nervous, the --

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[SERGEANT SHUTTLEWORTH]: -- the way he was holding his body.

Appellant argues that in both colloquies, the officers—who were lay witnesses as opposed to expert witnesses—should not have been allowed to communicate to the jury that they inferred that appellant was armed based on his mannerisms. Assuming without deciding that the testimony was erroneously admitted, we nevertheless conclude that any error was harmless beyond a reasonable doubt.

The Court of Appeals has described harmless error as follows:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Dionas v. State, 436 Md. 97, 108 (2013) (alteration in original) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Additionally,

> In considering whether an error was harmless, we also consider whether the evidence presented in error was cumulative evidence. Evidence is cumulative when, beyond a reasonable doubt, we are convinced that "there was sufficient evidence, independent of the [evidence] complained of, to support the appellant['s] conviction []." In other words, cumulative evidence tends to prove the same point as other evidence presented during the trial or sentencing hearing. For example, witness testimony is cumulative when it repeats the testimony of other witnesses introduced during the State's case-in-chief. The essence of this test is the determination whether the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded.

Dove v. State, 415 Md. 727, 743-44 (2010) (alterations in original) (internal citations omitted).

This Court discussed the principle of cumulative evidence in *In re Matthew S.*, 199 Md. App. 436, 468 (2011). There, we held that, even if a juvenile court had erred in admitting hearsay testimony, any error was rendered harmless because it was cumulative to other admitted evidence. *Id.* At issue in *Matthew S.* was whether the juvenile court erred in admitting certain hearsay testimony at Matthew's adjudicatory hearing for

distribution of marijuana. *Id*. at 441-42. Officer Geoffrey Rand was permitted, over objection, to testify regarding information he received from other individuals that "Matthew S. was the person who distributed the marijuana." *Id*. at 463-66. On appeal, we concluded that any error in admitting that testimony was harmless beyond a reasonable doubt. *Id*. at 468. We noted that, in addition to Officer Rand's testimony, another witness testified that he told the police that Matthew had sold him marijuana, and that yet another officer had testified, without objection, that this same witness told the officer he had purchased marijuana from a student named Matt S. *Id*. Because the alleged hearsay testimony was cumulative to, and proved the same point as the challenged evidence, we concluded that any error was harmless beyond a reasonable doubt. *Id*.

We similarly conclude that, even assuming error in the admission of Detective Wood's and Sergeant Shuttleworth's testimony that appellant exhibited characteristics and mannerisms of an armed person, this evidence proved the same point as other evidence presented during the trial—namely, that appellant was *actually armed*. At trial, Detective Wood testified, without objection, that after exiting his patrol vehicle, "[appellant] began to run north in that rear alley at which time he reached to his right side of his body and threw a firearm, a revolver firearm onto the ground." Sergeant Shuttleworth corroborated Detective Wood's testimony, testifying that he observed Detective Wood chase appellant, and that during the chase, he "observed a handgun fall to the ground. It was concrete ground so it made a loud sound. Also, sparks flew from the contact of metal hitting concrete."

In addition to the officers' testimony, the State introduced into evidence the body camera footage from Detective Wood, Sergeant Shuttleworth, and Officer Shank. These videos recorded the events leading up to appellant's arrest and show: Detective Wood chasing appellant, appellant dropping an object that creates sparks upon contact with the ground, the officers shouting that appellant has a gun, and clear footage of the officers identifying and recovering a gun. In light of this substantial evidence that appellant was in possession of a gun, the testimony from Detective Wood and Sergeant Shuttleworth that appellant *appeared to be* in possession of a gun based on his mannerisms is not only qualitatively less compelling, but also quintessentially cumulative. The officers' observations that appellant demonstrated the characteristics of someone trying to conceal a gun "tends to prove the same point as other evidence presented during the trial"— that appellant possessed a firearm. *Dove*, 415 Md. at 744. Accordingly, we have no difficulty concluding that any error was harmless beyond a reasonable doubt.

II. Evidence of Trespassing

Appellant next argues that the trial court erred in admitting Detective Wood's testimony that an unidentified individual stated he was trespassing. Acknowledging that the statement was offered for a non-hearsay purpose, appellant nevertheless argues that the trial court should have excluded the testimony because it constituted inadmissible bad acts evidence and was unfairly prejudicial.

The statement at issue came about during Detective Wood's direct examination:

[THE STATE]:	So what, if anything occurred once -- as you got closer to that house?

[DETECTIVE WOOD]:	Upon approaching the corner an unidentified individual looked over at them and stated --
[DEFENSE COUNSEL]:	Objection.
THE COURT:	Overruled.

* * *

[PROSECUTOR]:	You may continue.
[DETECTIVE WOOD]:	-- he stated hey, you guys are trespassing. You need to get out of there.
[DEFENSE COUNSEL]:	Objection.
THE COURT:	Overruled.

As noted, appellant concedes that the State offered this testimony for a non-hearsay purpose, but nevertheless argues,

> Even where a statement is offered ostensibly for a non-hearsay purpose, this does not settle the question of its admissibility. Courts have not hesitated to exclude out-of-court statements where juries would be unlikely to be able to distinguish their use as hearsay from the limited purpose for which they were admitted.

As we shall explain, although the trial court arguably erred in admitting this testimony as bad acts evidence, any error was harmless beyond a reasonable doubt.

"A ruling on the admissibility of evidence ordinarily is within the trial court's discretion." *Hajireen v. State*, 203 Md. App. 537, 552 (2012) (citing *Blair v. State*, 130 Md. App. 571, 592 (2000)). In the context of out-of-court statements not offered for their truth, we follow the "well-settled rule that the trial court, in its discretion, may exclude relevant evidence if it believes that the probative value of the evidence is substantially

outweighed by the dangers of unfair prejudice, confusion of the issues or misleading the jury." *Graves v. State*, 334 Md. 30, 40 (1994) (citing *Briggeman v. Albert*, 322 Md. 133, 138 (1991)).

In his brief, appellant cites three cases for the proposition that a trial court abuses its discretion by failing to exclude out-of-court statements that the jury is likely to misuse as substantive evidence: *Parker v. State*, 408 Md. 428 (2009); *Graves*, *supra*; and *Purvis v. State*, 27 Md. App. 713 (1975). These cases are unavailing, however, because the out-of-court statement in all three cases, ostensibly offered by the State for a non-hearsay purpose, asserted that the defendant had committed the very crime that the prosecution sought to establish at that defendant's trial. *See Parker*, 408 Md. at 431, 443 (holding inadmissible an informant's statement essentially identifying Parker as the person dealing heroin at a specific street corner because, despite the State's proffer for a non-hearsay purpose, the State used the statement for the truth of the matter asserted, thereby making it likely that the jury would misuse the statement as substantive evidence that Parker was guilty of possession of heroin); *Graves*, 334 Md. at 35, 42-43 (holding that accomplice's statement identifying Graves as the gunman was either inadmissible hearsay or, alternatively, of such limited probative value as non-hearsay evidence compared to the highly prejudicial likelihood that the jury would misuse the accomplice's "information as substantive evidence of guilt"); *Purvis*, 27 Md. App. at 716, 725 (stating that the informant's identification of Purvis as a drug dealer, ostensibly offered for a non-hearsay purpose, "was of misleading probative force which tended to influence the trier of facts to

believe that before Purvis'[s] contact with the officers he was already a dealer in heroin and thus more likely to have sold the drug to the detective as charged"). We readily distinguish these three cases. The State did not charge appellant with trespassing, and there is no likelihood that the jury misused the unidentified speaker's statement that appellant was trespassing as substantive evidence that he was in possession of a firearm.

Next, although we agree with appellant that the statement that he was trespassing constituted inadmissible bad acts evidence, we conclude that any error in its admission was harmless beyond a reasonable doubt.

Maryland Rule 5-404(b) governs the admission of evidence related to other crimes, wrongs, or bad acts. The rule "is designed to prevent the jury from becoming confused by the evidence, from developing a predisposition of the defendant's guilt, or from prejudicing their minds against the defendant." *Sifrit v. State*, 383 Md. 116, 132 (2004) (citing *State v. Faulkner*, 314 Md. 630, 633 (1989)). In *Sifrit*, the Court of Appeals explored what kinds of crimes, wrongs, or bad acts fall under the rule, stating, "[a]n act prohibited by the criminal code but which goes uncharged is perhaps easy to identify as a bad act, hence the term 'uncharged misconduct.'" *Id*. at 133 (alteration in original) (quoting *Klauenberg v. State*, 355 Md. 528, 547 (1999)). Because trespassing is clearly prohibited by the criminal code, and because appellant was not charged with trespassing as it related to this incident, the evidence meets the criteria for bad acts evidence under Rule 5-404(b). Nevertheless, we conclude that the admission of this evidence was harmless beyond a reasonable doubt.

Our review of the record reveals that the jury heard evidence that an unidentified person accused appellant of trespassing only once—in the colloquy recounted above during Detective Wood's direct examination. Although the transcript reveals that the prosecutor remarked in opening statement that the officers "noticed some people on the porch of a vacant home and it drew their attention because someone seemed to call out a warning[,]" there was no express reference to "trespassing." Moreover, other than the isolated reference to trespassing previously identified, the State made no effort to prove that appellant was trespassing. Furthermore, the State did not mention that appellant was trespassing at any point during closing or rebuttal arguments.

This prosecution revolved around appellant's unlawful possession of a firearm. To prove its case, the State relied on the testimony of two officers, as well as body camera footage, to show that on the evening of September 28, 2018, appellant was in possession of a firearm. That the jury heard a single reference during the course of the trial that an unidentified individual claimed appellant was trespassing did not bolster the State's case. We conclude that any error was harmless beyond a reasonable doubt. *Dionas*, 436 Md. at 108.

III. The Supplemental Jury Instruction

Appellant's final argument on appeal is that the trial court erred by providing a State-requested jury instruction concerning redactions to the officers' body camera footage. As we shall explain, appellant has failed to preserve this argument for our review.

The instruction at issue, which we shall provide below, came about because the State apparently edited the officers' body camera footage prior to trial without providing notice to appellant. Defense counsel recognized these edits, however, and addressed them during cross-examination of both Detective Wood and Sergeant Shuttleworth. During cross-examination, Sergeant Shuttleworth acknowledged that his body camera footage "maybe" captured more content than what was played in court. Similarly, Detective Wood conceded on cross-examination that the overall footage from his body camera that evening was approximately seventeen minutes long, but that four minutes had apparently been edited out of the video played in court. When defense counsel asked whether appellant had spoken with the detective during this missing footage, the State objected, and the court ruled at a bench conference, as follows:

> THE COURT: I've allowed you to ask the question of whether the video has been edited, but if you're suggesting that anything untoward happened in the gaps, you know, obviously you'd be allowed to play whichever portions you wanted to. So if you're suggesting that anything like that happened and that it was edited out, I'd ask you to either stop or play what you're talking about. So at this point the objection is sustained.

When the parties returned the next morning to discuss jury instructions, the State proposed the following jury instruction:

> The State or the Defense may have offered evidence that may have been partially redacted, which means that certain content may have been muted or

> cut meaning that only a portion may be offered into evidence. Redactions are sometimes necessary for a wide variety of reasons, including that the redacted information is unrelated to be [sic] evidence of the case or that the court has determined that the information is not admissible to protect private or personal information of individuals or by agreement of both parties. These are just some examples of why certain things may be redacted. You may give the unredacted information, any document whatever weight you choose and you're not to consider any characterization of the fact or existence of a reduction [sic] in any document including by counsel.[1]

Defense counsel took issue with the instruction as a whole, but specifically challenged the propriety of the final sentence, arguing that the instruction made "it sound like [she couldn't] get up in front of the jury and make appropriate argument as to missing pieces in a piece of evidence that the State chose to make."

The court responded:

THE COURT:	Well, it's clear that its [sic] been redacted.
[DEFENSE COUNSEL]:	Yes.
THE COURT:	And I think [the Prosecutor] likely did that for strategic purposes because your client made exculpatory statements on it and he didn't want to offer those statements. So to the extent -- here's -- this is actually kind of an interesting question because, you know, does [the Prosecutor] get the benefit of not offering the entirety of the tape because it

[1] As the State notes in its brief, the record does not contain a copy of the proposed instruction. Instead, we rely on the instruction actually given with one clarification. As we shall explain below, the court declined to provide the last sentence of the proposed instruction. We are only able to produce this last sentence because defense counsel read it into the record during discussions with the court. In any event, when the court ultimately gave this instruction, it deleted the last sentence of the State's proposed instruction.

> includes statements that he doesn't want to offer. And obviously I didn't let you offer it because you're not allowed to offer, you know, -- it's not a party opponent so you wouldn't be allowed to do that. So I cut you off slightly yesterday when you were making the argument that -- when you were suggesting to the jury essentially that there was something nefarious by way of cutting out parts of the tape. But I believe that you have already been able to make suggestions to the jury that they have essentially been doctored. I believe that that impression has already been given. That said, I was inclined at first reading to give the instruction that [the Prosecutor] requests, but now -- we'll continue this later.

The court later determined that it would not provide the State's proposed instruction on the redacted evidence, but cautioned defense counsel that if she were to persist in arguing the significance of the redactions at closing, the court would reconsider providing the requested instruction:

> So at this point I do think it would be one thing if [the Prosecutor] had redacted the tape for the purpose of saving Mr. Clinkscales from himself, if he had made reference to other crimes, anything like that, but that's not what we have here. We have the State having redacted the tape for strategic purposes and not wanting to offer the statement that Mr. Clinkscales made. Essentially [the Prosecutor], as you know, cut out parts that you're not able to offer because they are not statements -- they're statements by your client, therefore, not statements of a party opponent. Given that that is the case, while I am not wedded to the Pattern Jury Instructions typically, at this point I don't believe it's an -- that the State's proposed redaction instruction is

> appropriate. But if you argue more about the redactions, I may re-examine that.

The court then instructed the jury and closing arguments commenced. During defense counsel's argument, counsel disregarded the court's warning and argued the significance of the missing body camera footage as follows:

> Now the State has introduced three videos from the body worn camera. One from the detective that was never called, Detective Shank that picked it up off the ground and then took it to the evidence control. And two, played through the -- Detective Wood and Sergeant Shuttleworth.
>
> Now you heard during cross examination, I asked him about the timestamp and the time and date and Detective Wood didn't really know too much about it, but Sergeant Shuttleworth seemed to agree that the timestamp that you're going to see -- and you'll have the video and I urge you to play those videos over and over -- the timestamp up in the upper right-hand corner, he agreed that that did coordinate with some kind of time, maybe some Greenwich Time or something like that, but that's a time. And you can see that there's three sets of two numbers. It starts at 0050 I think 46 is when they both turn it on. Something like that. I wrote it down. 005047 are the numbers you're going to see on the upper right-hand screen of the body worn camera of Sergeant Shuttleworth and Detective Wood. And you see the date is September 29th, 2018. But they testified that this happened on September 28th, 2018 at about 8:50. So it looks like the numbers -- there needs to be some kind of adjustment. Unfortunately Sergeant Shuttleworth was not able to testify as to what the adjustment needed to make. But the reason those numbers are important is because when you watch that video played in entirety you will see the numbers skip. You will see and you saw that it looked like there was something skipping in part of those videos. It didn't play smoothly. Like you saw Mr. Clinkscales on the ground in custody and then all of a sudden there's a marked patrol car and he's taken to the patrol car. There's chunks taken out of that video. And just keep that in mind as you're watching it. It doesn't play smooth. It looks like it's jumping around and the times jump around, jump ahead four minutes missing time in the videos.

Following defense counsel's argument, the State renewed its request for the aforementioned instruction. This time, the court informed defense counsel that the

instruction was now appropriate based on counsel's closing argument. Defense counsel responded that she "did not cross the line" and was "just noting what is in evidence." Defense counsel claimed not to have understood the court's warning that it would reconsider providing the instruction if her argument addressed the redaction. The court provided the State's requested instruction to the jury, but omitted the final sentence, agreeing with defense counsel that the last sentence of the proposed instruction was problematic.[2]

On appeal, appellant argues that the trial court erred in providing the redaction instruction as given for three reasons: first, the instruction created an inference that whatever footage the State redacted was irrelevant; second, the instruction implied that the State redacted the footage at the direction of the court; and third, the instruction inaccurately suggested that appellant consented to the redactions. Our careful review of the transcript reveals that appellant failed to raise any of these specific grounds at trial.

Maryland Rule 4-325 governs jury instructions in criminal proceedings. Rule 4-325(e) provides:

> No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in

[2] As indicated in Footnote 1, the court omitted the following sentence from the redaction instruction: "You may give the unredacted information, any document whatever weight you choose and you're not to consider any characterization of the fact or existence of a reduction [sic] in any document including by counsel."

> the instructions, material to the rights of the defendant, despite a failure to object.

This Court has strictly construed the requirement that the party objecting to jury instructions distinctly state the matter to which that party objects. *See Head v. State*, 171 Md. App. 642, 667 (2006) (holding that objections to jury instructions were waived where "[n]one of [defendant's] reasons for objecting to the instruction were raised below), *cert. denied*, 398 Md. 315 (2007). Because the three arguments mentioned in appellant's brief were not raised below, they are not preserved for our review.[3]

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[3] Appellant did specifically object to the last sentence of the State's proposed instruction, which we have recited in Footnote 2. As previously noted, the court agreed with appellant and omitted that sentence from the jury instruction. To the extent appellant complains about that omission, we merely note that appellant cannot legitimately complain about that which he requested. Finally, appellant's contention that the instruction improperly commented on the evidence was likewise not preserved.